In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 450

HAMILTON MEMORIAL GARDENS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner is a cemetery association which sells grave spaces and markers on a prepaid plan whereby it receives advance cash payments free of any restriction on the time or manner of their use. Petitioner deducted from these prepaid amounts estimated expenses of cemetery development and grave markers in computing its gross income for federal tax purposes. The Commissioner treated the prepayments as gross income in the year received, and allowed deduction of the development and marker expenses in the years in which they were actually expended. The Commissioner's treatment of the prepayments was sustained by the Tax Court and the court of appeals.

That decision is correct; it does not conflict but

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rather is in accord with the decisions of this Court and the other courts of appeals. There is no ground for further review.

1. Contrary to petitioner's assertions (Pet. 3–4), there is no conflict with this Court's decisions in *Doyle* v. *Mitchell Brothers Co.*, 247 U.S. 179, and *Burnet* v. *Logan*, 283 U.S. 404. *Doyle* v. *Mitchell Brothers Co.* holds that the federal income tax is imposed upon net, or taxable, income, rather than upon gross receipts. 247 U.S. at 184–185. *Burnet* v. *Logan* holds that in a transaction where property was sold with the sales price to be paid on a contingent basis in future years, and the obligation to pay could not be reduced to the present equivalent of cash, the taxpayer could defer reporting gain on the "open" sale until she had recovered her capital investment in the property transferred. 283 U.S. at 413.

There has been no tax here on petitioner's gross receipts; petitioner will be allowed to deduct its costs of development and supplying grave markers as and when they are incurred. These prepaid amounts were entirely at taxpayer's disposal for current use; they were not held in a specially established trust, or otherwise untouchable form—factors that would have justified the treatment for which petitioner contends.[1]

Petitioner's reliance on those two cases confuses the question of *what* income is taxable with that of *when* income becomes taxable. This case, of course, involves only the latter issue. In holding that the advance pay-

[1] Cf. *Monte Vista Burial Park, Inc.* v. *United States*, 340 F. 2d 595 (C.A. 6); *Mount Vernon Gardens, Inc.* v. *Commissioner*, 298 F. 2d 712, 716 (C.A. 6).

ments were taxable when received, the court below correctly applied the rule that money received without restriction is income when received, notwithstanding the fact that later expenditures of that income will generate deductible business expenses. This doctrine has been established by a long line of cases, including *Schlude* v. *Commissioner*, 372 U.S. 128; *American Automobile Assn.* v. *United States*, 367 U.S. 687; *Commissioner* v. *Hansen*, 360 U.S. 446; *Security Mills Co.* v. *Commissioner*, 321 U.S. 281; *Brown* v. *Helvering*, 291 U.S. 193; *North American Oil* v. *Burnet*, 286 U.S. 417; *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359.

Most recently, the Fifth Circuit, in *Jefferson Memorial Garden, Inc.* v. *Commissioner*, 390 F. 2d 161, reaffirmed this doctrine in a cemetery association case involving essentially the same issue as that raised here, *i.e.*, the excludability of prepayments for grave spaces and markers. In holding the prepayments taxable when received, the court in *Jefferson Memorial Gardens, Inc., supra*, followed the Seventh Circuit's decision on the same point in *Sherwood Memorial Gardens* v. *Commissioner*, 350 F. 2d 225, and rejected the very constitutional contentions advanced here. In short, there has been consistent and uniform application by the lower courts of the doctrine of taxability of unrestricted prepaid receipts.

2. There is no merit to petitioner's assertion that the annual accounting principle enunciated in *Schlude* and *American Automobile Assn.* is inapplicable because those cases involved prepayment for services

rather than goods. This purported distinction has been rejected by the Fifth Circuit in *Jefferson Memorial Gardens, Inc., supra,* by the Seventh Circuit in *Consolidated-Hammer Dry Plate & Film Co.* v. *Commissioner,* 317 F. 2d 829, 833, and by several decisions of the Tax Court.[5]

Congress too has rejected this distinction and confirmed the Commissioner's position here. When the short-lived Section 452 was enacted in the 1954 Code,[6] Congress allowed deferral of prepaid income where money was received in connection with an obligation to furnish goods or services which extended beyond the close of the tax year in which the prepayments were received. The Senate Finance Committee Report on Section 452 noted (S. Rep. No. 1622, 83d Cong., 2d Sess., p. 301):

> Under the 1939 Code, regardless of the method of accounting, with minor exceptions established by regulations or administrative practice, amounts are includible in gross income by the recipient not later than the time of receipt if they are subject to free and unrestricted use by the taxpayer even though the payments are for *goods or services* to be provided by the taxpayer at a future time. * * * [Emphasis supplied.]

The repeal of Section 452, by its terms applicable to both goods and services, reinstated the law as it had

[5] See, *e.g.*, *Hagen Advertising Displays, Inc.* v. *Commissioner*, 47 T.C. 139, appeal pending (C.A. 6) (prepaid custom-built advertising signs); *Farrara* v. *Commissioner*, 44 T.C. 189 (prepaid clothing); and *Krim-Ko Corp.* v. *Commissioner*, 16 T.C. 31 (prepayments for advertising services and materials).

[6] Section 452 was repealed, retroactively, in 1955. Section 1 Act of June 15, 1955, c. 143, 69 Stat. 134.

been under the 1939 Code and as it is today. *Schlude* v. *Commissioner, supra,* 372 U.S. at 134–135. Congress has explicitly rejected petitioner's approach except in two very limited areas: prepaid subscriptions to periodicals, governed by Section 455, enacted in 1958,[4] and prepaid dues of certain membership organizations, covered by Section 456, enacted in 1961.[5]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Section 28(a), Technical Amendments Act of 1958, P.L. 85–866, 72 Stat. 1606, 1625.

[5] Section 1, Act of July 26, 1961, P.L. 87–109, 75 Stat. 222.

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